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STATEMENT OF THE CASE

On the 5th of April, 1961, Cuyahoga Falls Police apprehended co-petitioner Anthony Verzi at the scene in a residential area in Cuyahoga Falls, at approximately 5:00 A.M. Later the same morning, the Cuyahoga Falls Police Department apprehended his brother, John Verzi, at his home and placed him in the Cuyahoga Falls Municipal Jail at approximately 10:15 A.M. The petitioners were charged with violation of Ohio Revised Code Section 4549.05 and 4549.06, theft of automobile tires and tampering with automobile locks. The petitioners were represented by counsel, Marvin A. Koblentz, shortly after they were apprehended. Subsequent to the initial stages of the criminal proceeding, Mr. Koblentz was discharged by the petitioners, and the petitioners retained two attorneys to prepare their defense, Mr. Valorie and Mr. Fanelly. Mr. Valorie and Mr. Fanelly continued to represent the defense until shortly before trial on December 6, 1961. Shortly before trial, on the 5th of December, 1961, the petitioners discharged Mr. Valorie and Mr. Fanelly and against retained the original counsel, Marvin A. Koblentz. The case came on for trial on the 6th of December, 1961, a jury having been called at which time counsel for the petitioners, Mr. Koblentz, requested a continuance so that written notice of alibi could be presented in accordance with Ohio Revised Code Section 2945.58. The court overruled the motion for a continuance; the matter proceeded to trial; the jury subsequently found them both guilty of violations of Sections 4549.05 and 4549.06.

In the course of the trial, the State presented evidence of conversation overheard between the petitioners, Anthony Verzi and John Verzi on the day of their apprehension, April 5, 1961, while incarcerated in the Cuyahoga Falls Municipal Jail. This conversation was overheard at the desk by means of an intercom system between each cell in the Cuyahoga Falls Jail and the Desk Sergeant. The speaker was in no way concealed or hidden in the jail cell, in which the petitioners' voluntary statement was made and subsequently overheard by the Police Department.

ISSUE

DID THE TRIAL COURT INFRINGE PETITIONERS' CONSTITUTIONAL RIGHTS IN REFUSING TO GRANT A CONTINUANCE AT THE TIME OF TRIAL?

It is the general rule in Ohio that the granting or refusal of a motion for continuance rests with the sound discretion of the trial court. Caston v. Paige, 9 O.S. 397 (1859); Loeffner v. State, 10 O.S. 598 (1857); Holt v. State, 11 O.S. 691 (1860); State ex rel Buck v. McCabe, 140 O.S. 535, 45 N.E. 2d 763 (1942).

An appellate court will not interfere with the exercise of this discretion unless it clearly appears from all of the facts and circumstances, that there has been an abuse of this discretion operating to the prejudice of the party in the final determination of the case. Caston v. Paige, supra. In the case at hand, the attorney for the petitioners requested a continuance for the purpose of filing the notice of alibi with the prosecutor. The statutory provision regarding the notice of alibi reads as follows:

> "Whenever a defendant in a criminal cause proposes to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than three days before the trial of such cause, file and serve upon the prosecuting attorney, a notice in writing of his intention to claim such alibi ... If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of providing such alibi." 2945.58 Ohio Revised Code.

The attorney for the petitioners, Marvin A. Koblentz, was originally retained by the petitioners at the initial stages of the proceeding. Subsequent to the initial stages of the criminal proceedings, Mr. Koblentz was discharged by the petitioners. Between the discharge of Mr. Koblentz and the date of the trial, the petitioners retained two attorneys to prepare their defense, Mr. Valorie and Mr. Fanelly. Less than twenty-four hours before the trial was to commence, Mr. Koblentz was rehired by the petitioners. Up to the date of the trial, no notice of alibi had been filed with the prosecuting attorney. On the day set for trial, Mr. Koblentz requested the continuance to file the notice of alibi for John Verzi. It should be noted that the petitioners, at

all times, from the commencement of the criminal proceedings were ably assisted by counsel. As an alibi is an integral part of the defense of the accused, if such had been made known to any of the three defense attorneys intermittently retained by John Verzi prior to the trial date, certainly the notice of alibi would have been timely filed with the prosecuting attorney. However, such was not the case. John Verzi waited until less than twenty-four hours before the trial was scheduled to commence. We can only assume that this delay in making the alibi known was nothing more than a ruse. It does not appear from the testimony of John Verzi that his hesitancy to disclose his alibi was due to a desire to shield an innocent part, as he freely disclosed his whereabouts regarding the day of the crime until the approximate time of the commission of the crime. Only after the prosecutor's objection was sustained was testimony excluded regarding his whereabouts at the time of the crime. There can be no implication that either Mr. Valorie or Mr. Fanelly were unaware of the requirement of filing the notice of alibi, as both attorneys are able and respected members of the Bar and both familiar with criminal procedure. John Verzi had ample opportunity to make known his alleged alibi.

In Ford v. State, 121 O.S. 292, 168 N.E. 139 (1929), the defendant was indicted for first degree murder. The defendant retained an attorney to defend him. This attorney was present with the defendant at the arraignment. At the commencement of the trial, this attorney started to qualify the jurors. Thereafter, this attorney asked for and was granted leave to withdraw as defense attorney. The defendant did not object to this. Prior to the appointment of a court-appointed attorney, the second attorney of the defendant's choice made a motion for a continuance of two weeks to properly prepare the defense. The trial court overruled this motion. The second attorney of the defendant's choosing refused to proceed and the court appointed another attorney to defend the accused.

The Ohio Supreme Court held that the trial court did not err in overruling the motion for the continuance and stated that the trial court was

justified in holding that the convenience of the court, the jury and the witnesses was paramount to the right of the defendant to counsel of his personal choice.

The Supreme Court of Ohio went on to state that under the theory advanced by the appellant that the accused would be entitled to halt for an indefinite time the prosecution of his case if for one reason or another, counsel of his own choosing refused to accept the employment.

In State v. Frabutt, 88 O.L. Abs. 5, 18 O.O. 2d 277 (1961), the court stated that the fact that the trial court permitted defendant to change his mind and to hire other counsel to aid and assist in the defense does not justify a continuance in the trial at such an advanced stage of the proceedings and probably not at any stage of the proceedings.

In the case at hand, the request for a continuance was nothing more than a request to properly prepare a defense. The dictates of Section 2945.58 Ohio Revised Code must be strictly complied with. If there had not been a change of defense counsel at the last minute and the original counsel, on the day of the trial, had requested a continuance in order to file his notice of alibi, this would most properly be denied. Therefore, merely because the accused chooses to retain another attorney at the last minute, in the light of the above cases, should not change the procedure and the motion is properly denied.

The trial court's reasons for refusing the request for a continuance are set forth on Page 5, Bill of Exceptions:

> "Well, I am going to overrule the request for a continuance at this time. The reasons for it being that the affidavits in this case were made and filed on the 7th day of April, 1961; that the Defendants have had ample time, certainly, to file any defense that they wish to make in this cause. They have had, to the Court's knowledge, in between the original hiring of Mr. Koblentz and the recent hiring of Mr. Koblentz, other counsel that the Court is aware, Mr. Valorie and Mr. Fanelly of the Akron Bar.
>
> This matter was originally scheduled for trial in November, and was continued because, I believe, counsel for the Defendant, Mr. Koblentz, was scheduled in other courts during the month of November. The matter was continued until this date. I am sure

that the Defendants have had ample opportunity to present notice to the prosecuting attorney, and I believe Mr. Koblentz, in chambers, has indicated to me that he notified the Defendants that this case was set for trial by mail some ten days, I think, or so, before this actual trial date; that no response was had until yesterday; and under those circumstances, I feel the Court has extended as much in the interest of substantial justice as it should be required to do, and I am going to overrule the request for a continuance."

The landmark case of Powell v. Alabama, 287 U.S. 45 (1932), is clearly distinguishable on its facts from the case at hand. In the present case, the petitioners were represently by counsel for nine (9) months prior to the trial and were ably represented at the time of trial by Mr. Koblentz. These facts, in no way, resemble or compare with the Powell case, the facts of which the court well knows. The petitioners' rights were, in no wise, jeopardized or infringed as a result of failure to grant an additional continuance. To the contrary, the trial court acted properly in overruling the procedural motion.

By analogy, I direct the court's attention to the case of Berman v. U.S., 378 U.S. 530 (1964), in which the second circuit dismissed an appeal of the accused in a felony case where the defense counsel was allegedly ill at the time and failed to comply with Rule 37 (a) (2), The Federal Rules in Procedure, perfecting his appeal. The dismissal was unanimously affirmed per curiam, without opinion June 22, 1964. Clearly, substantial justice requires that there be a procedural limit as to appeal time and likewise substantial justice dictates there be a procedural limit to the number and manner of granting continuances in a criminal case.

ISSUE

WAS THE ADMISSION INTO EVIDENCE BY THE TRIAL JUDGE OF INCRIMINATING STATEMENTS VOLUNTARILY MADE BY THE PETITIONERS WHILE INCARCERATED A VIOLATION OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS?

The record is clear that the petitioners were the only two individuals incarcerated in the Cuyahoga Falls Jail at the time of the conversation in

question. The direct examination of Officer Formby reveals the following testimony. (Bill of Exceptions, P. 249):

"Q. Did you have occasion to observe them by means other than face to face?

A. Yes.

Q. Either their apprehensions or deeds?

A. Yes sir.

Q. And how did you observe them?

A. Through what medium?

Q. Yes.

A. Through the microphones that are in the cell block.

Q. And that is here in jail?

A. That's correct.

Q. That's in the building here in Cuyahoga Falls?

A. Yes sir, it is.

Q. Now, you overheard them through the nicrophone that goes into the cells of the jail?

A. Yes, sir. You can turn each individual cell on, select them as you want them.

Q. And did you do this?

A. Yes."

Q. There were only two men in the jail?

A. Yes, sir."

(Continued, Bill of Exceptions, P. 251):

"Q. And you were able to ascertain that only the two Verzi brothers were in jail at this time?

A. That's correct."

The testimony of Police Chief Menzo Preston corroborated the fact that there were only two individuals in jail at the time of the overheard conversation. (Bill of Exceptions, P. 266):

"Q. So, at the time John Verzi was incarcerated, there was only one other person in the jail, and that was his brother, Anthony, according to the records you have in your hand?

A. That's correct.

It is only necessary that the identity of the accused be established with reasonable certainty. Evidence as to the identity is a question of fact for the jury's determination preliminary to the admission of the conversation. Leonard v. Mowbray, 21 O. App. 268 (1926). Petitioner himself does not take issue with this contention.

The subject matter of the conversation itself lent itself to an identification of the parties. There is abundant testimony that two individuals were stealing tires and that only one, Anthony Verzi, was apprehended by Officer Formby. The other escaped on foot, thus: (Bill of Exceptions, P. 252):

"Where did you go?' And he said,

'I ran between the houses."

Wigmore on Evidence, 1954 Edition, P. 405, in discussing the authentication of circumstantial evidence regarding telephone messages, states:

> "The needed link, however, will be supplied if the witness testifies that he recognized X's voice, or the message reveals that the speaker had knowledge of facts that only X. would be likely to know, or if other confirming circumstances makes it probable that X. was the speaker." (Emphasis added.)

As regards the identification of the pliers found by Patrolman Ball in the vicinity where Anthony Verzi was apprehended, the law in Ohio is clear that the competency of circumstantial evidence is not open to question, provided it is the best evidence which the nature of the case admits. When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in the reception of the circumstantial evidence. 21 O. Jur 2d 209.

It is further clear that the speaker in the cell in which the petitioners were incarcerated was not hidden, rather was openly displayed in the cell and further that their conversation was voluntary. The conversation was not surreptitiously obtained as in the case of Massiah v. U.S., 377 U.S. 201 (1964) in which the defendant was induced to make incriminating statements which were subsequently used.

The court's attention is directed to Lopez v. U.S., 373 U.S. 427 (1963) in which the defendant's statements were recorded by means of a hidden mechanism and relayed to a concealed device. This court, in the Lopez case, held that the defendant's voluntary statements were not used in violation of his right against self-incrimination.

Therefore, the court should not long concern itself with this issue as the petitioners' statements were voluntarily made while incarcerated and were overheard and subsequently used at trial after the proper foundation was laid by the prosecutor as indicated above in Bill of Exceptions.

CONCLUSION

The respondent respectfully submits that the trial court did not abuse its discretion to the prejudice of the petitioners by refusing request for a continuance. The request for a continuance was not made until the day set for trial. The court, attorneys, jurors and prosecuting attorney were prepared for trial. The refusal to grant a continuance was not, in any manner, in violation of the petitioners' constitutional rights.

The testimony of the overheard conversation by Officer Formby was properly admitted. The identity of the speaker was established with reasonable certainty and was, in fact, weighed by the jury and found to be true. The conversation was overheard while the petitioners were incarcerated and was not, in any manner, surreptitiously obtained, but was entirely voluntary. Based on the above cited cases, it is clear that the petitioners' constitutional protection against self-incrimination was not violated in any manner. Therefore, the respondent respectfully submits that the petition for Writ of Certiorari be denied.

Respectfully submitted,

Joseph B. Killian, Attorney for
Respondent, State of Ohio